

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. P-0006
of Aquila, Inc., seeking)
resolution of a dispute under) AQUILA'S MOTION FOR CEASE
Nebraska Revised Statute Section) AND DESIST ORDER DENIED
57-1306.)
) Entered: June 3, 2003

Appearances

For Aquila, Inc.:
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For the Commission:
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BY THE COMMISSION:

By motion filed May 9, 2003, Aquila, Inc. (Aquila) requests an order requiring Metropolitan Utilities District (M.U.D.) to cease and desist condemnation of an easement along the east side of Highway 50 south of Highway 370 for a 1200 foot natural gas main, pending a full hearing on Aquila's formal complaint in the above-captioned matter.

The Commission held a hearing on Aquila's motion May 29, 2003, in the Commission Hearing Room at 300 The Atrium, 1200 N Street, Lincoln, Nebraska, with appearances as listed above. The parties entered into a stipulation of facts and exhibits, which was received in evidence as Exhibit 1. The pertinent facts are as follows:

1. On May 7, 2003, the M.U.D. Board authorized M.U.D. staff to proceed with condemnation of an easement along Highway 50 south of Highway 370 to effectuate a connection with a Town Border Station (TBS) at 174th and Fairview Road (the "Fairview Road TBS"). (Exhibit 1: Stipulation par. 13 and 15).

2. In Application No. P-0004, the Commission determined that a main constructed along Highway 50 from Prairie Corners to just south of Highway 370 was not in the public interest. (Exhibit 1: Stipulation par. 6 and 11, Exhibit 1:D).

2. Northern Natural Gas Company (Northern) is planning to commence construction of the Fairview Road TBS in June of 2003. (Exhibit 1: Stipulation par. 14).

3. On October 2, 2002, M.U.D. and Northern executed an agreement for construction of a new TBS, which is to be located at 174th and Fairview Road. (Exhibit 1: Stipulation par. 20, Exhibit I).

4. Northern asserts that it is not required to make a filing with the Federal Energy Regulatory Commission (FERC) prior to the installation of the Fairview Road TBS. (Exhibit 1: Stipulation par. 24).

5. M.U.D. has received funds from Northern pursuant to the October 2, 2002, agreement. (Exhibit 1: Stipulation par. 21, and Exhibit 1:J).

6. M.U.D. management did not communicate to Aquila its planned condemnation to obtain an easement along Highway 50 prior to Aquila obtaining actual notice at an M.U.D. Committee Meeting held May 2, 2003. (Exhibit 1: Stipulation par. 16).

O P I N I O N A N D F I N D I N G S

The Commission finds that Aquila's motion should be denied.

In Application No. P-0004, the Commission ultimately found that M.U.D.'s proposed main extension in Highway 50 was not in the public interest, and that M.U.D. must cease and desist from additional construction in Highway 50 south of Prairie Corners. In its order of August 13, 2002, on M.U.D.'s Motion for Clarification in Application No. P-0004 (Clarification Order), the Commission found as follows:

At some time in the future, M.U.D. might make a final determination on relocation of the town border station (TBS) within the parameters of Neb. Rev. Stat. § 57-1301 et seq., and might obtain the necessary approval for the relocation. If that relocation requires construction in Highway 50 south of Prairie Corners, such construction would not be prohibited by the Commission's order of July 16, 2002, in this

docket; however, M.U.D. would not be entitled to re-establish service to the Highway Crossing development.

The Clarification Order further provides:

M.U.D. must evaluate the public interest criteria of Neb. Rev. Stat. § 57-1301 et seq., as the law requires for any gas main extension. M.U.D. should also communicate its determination and planned extension to Aquila, pursuant to the Commission's suggestions regarding communications between the parties. If Aquila disagrees that the relocation of the TBS is in the public interest, Aquila can bring the matter before the Commission by filing an application pursuant to Neb. Rev. Stat. § 57-1301 et. seq.

Based upon evidence before the Commission, it appears that M.U.D. and Aquila are generally following the Commission's directives in the Clarification Order, with one notable exception, which will be addressed below. Regarding evaluation of the public interest criteria pursuant to Neb. Rev. Stat. § 57-1301 et seq., the Commission does not believe that the hearing on Aquila's Motion would have been the appropriate forum for M.U.D. to demonstrate the presence of such criteria, or to argue the applicability of such criteria. The full hearing on this matter, following discovery, is the proper forum. Regarding approval for movement of the TBS, the Stipulation filed by the parties provides that Northern asserts that FERC approval is not necessary. In addition, the M.U.D. Board has apparently given its approval by entering into the October 2, 2002, agreement in Exhibit 1:J.

As the Commission described in the Clarification Order, the law affords Aquila an opportunity to object to moving the TBS. Aquila has invoked its right to bring a formal complaint to the Commission, initiating the above-captioned docket, because it does not agree that relocation of the TBS is in the public interest. Thus, the parties have largely acted in accordance with the policies and progression of events described in the Clarification Order.

One instruction in the Clarification Order was not followed. The Commission asked M.U.D. to communicate with Aquila upon determining that a main extension to a new TBS is in the public interest, and to advise Aquila of such a planned extension. While the Commission did not create an additional notice requirement in the Clarification Order, the Commission has repeatedly asked that M.U.D. and Aquila communicate openly about planned extensions.

M.U.D. argues that condemnation of an easement is not the time at which notice should be given pursuant to the Clarification Order. This argument is patently disingenuous. M.U.D. has indicated that it is pursuing the easement for the express purpose of construction to the Fairview TBS. M.U.D. cannot parse the project into two segments; M.U.D. has engaged in a course of action and should have affirmatively notified Aquila prior to approving the eminent domain proceeding.

While the Commission has authority to enter a cease and desist order, and has done so in gas pipeline complaints in the past, the Commission does not take this responsibility lightly. In this instance, a cease and desist order should be considered only after a full hearing and thorough deliberation on the matter.

Finally, the Commission notes that M.U.D.'s pursuit of an easement does not pose any immediate threat to Aquila. Both M.U.D. and Aquila will have an opportunity to present evidence to the Commission regarding whether the proposed main is in the public interest at the full hearing in this matter. M.U.D.'s ratepayers, however, are potentially harmed by M.U.D.'s action. If the Commission ultimately determines that the proposed main extension is not in the public interest, M.U.D.'s ratepayers will have paid associated legal costs and condemnation damages unnecessarily. The Commission points this out as a matter of information, and urges M.U.D. to carefully consider whether to pursue condemnation pending a resolution of this complaint.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Aquila's Motion for a Cease and Desist Order is denied.

MADE AND ENTERED at Lincoln, Nebraska, this 3rd day of June, 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director